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No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. N. FLOWERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on March 23, 1945, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 14–21) is not reported. The opinion of the Circuit Court of Appeals (R. 57–60) is reported at 148 F. 2d 163.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1945. (R. 60.) The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in holding that taxpayer's expenditures in 1939 and 1940 for meals and lodging while living at the city where he has been regularly and principally employed since 1927, and for trips between that place and another city where he chose to keep a residence and perform some of his work, were non-deductible living and personal expenses within the purview of Section 24 (a) (1) of the Internal Revenue Code, not ordinary and necessary business traveling expenses deductible under Section 23 (a) (1) (A).

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 14–19) may be summarized as follows:

Taxpayer, a lawyer, commenced the practice of law in Mississippi in 1896. In 1903 he moved to Jackson, Mississippi, where he served as assistant attorney general of the State until 1906, when he resigned to enter a law firm in Jackson. Later he formed a new law firm at Jackson which since 1922 has been known as Flowers, Brown &

Hester. (R. 14.) In 1917–1918 he built a house in Jackson, which he has since maintained for himself and his family. (R. 15.)

In 1906 taxpayer began representing the predecessors of the Gulf, Mobile & Ohio Railroad, his present employer. From then until about 1918 he tried cases for the company, mostly in Mississippi where the bulk of its properties were located; from then until 1927 he acted as special counsel for the company in Mississippi. In 1927 he was elected general solicitor and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad company were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad. (R. 14–15.)

The principal office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the principal office of its predecessor. When offered the position of general solicitor in 1927, taxpayer was unwilling to accept if it required him to give up his residence in Jackson. Accordingly, an arrangement was made between him and the railroad company whereby he was permitted to determine for himself the amount of time he would spend in Jackson and Mobile, respectively, on condition that he pay his own traveling ex-

penses between the two places and his living expenses in both places. This arrangement continued through the taxable years. (R. 15–16.)

The railroad company provided an office for taxpayer in Mobile but not in Jackson. When taxpayer worked in Jackson his law firm provided him with office space, in which he had some of his own furnishings. The company also provided telephone service and a desk and typewriter for his secretary in his Jackson office and paid the secretary's expenses while in Jackson. (R. 16.) While most of the legal business of the company was conducted in Mississippi, this business was handled by local counsel, taxpayer's participation being advisory only and not different from his participation in similar business handled by local attorneys in other areas. (R. 16–17.) Taxpayer's employment did not prohibit him from accepting outside law work, but after the first few years he performed outside work only occasionally and during the taxable years performed none at all. He has not participated in the conduct of the business of the Jackson law firm whose title still includes his name, nor has he shared in its income. (R. 16.)

Since his employment by the railroad company in 1927, first as general solicitor and thereafter as general counsel and vice president, taxpayer has performed his duties principally at the main office of the company in Mobile. However, during 1939 and 1940, the taxable years, he chose

to spend most of his time in Jackson, working on matters relating to the merger. (R. 18.) During 1939 he spent 203 days in Jackson and 66 in Mobile and made 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. (R. 17–18.) The railroad company paid all of taxpayer's traveling expenses when he went on business trips to points other than Jackson or Mobile, but it paid none of his expenses in traveling between these two points or while he was at either of them. His salary as general counsel in 1939 was $17,000, and as vice president and general counsel in 1940 it was $25,536.40. (R. 18.)

In his income tax returns for 1939 and 1940 taxpayer deducted his expenditures for meals and lodging while in Mobile and the expense of traveling between Mobile and Jackson, in the amount of $900 for 1939 and $1,620 for 1940. The Commissioner disallowed the deductions. (R. 19.) The Tax Court sustained the Commissioner's determination (R. 22), and the Circuit Court of Appeals reversed (R. 60).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that taxpayer's living expenses at his regular and principal place of employment are deductible under Section 23 (a) (1) (A) of

the Internal Revenue Code as ordinary and necessary business traveling expenses.

(2) In holding that taxpayer's expenses in traveling between the place where he was regularly and principally employed and a place where he chose to keep a residence and perform some of his work are deductible under Section 23 (a) (1) (A) as ordinary and necessary business traveling expenses.

(3) In construing "home", for purposes of Section 23 (a) (1) (A), as denoting an abode where the taxpayer intends to live permanently, rather than his abode at the place where he is regularly or principally engaged in business.

(4) In reversing the judgment of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Barnhill* v. *Commissioner*, and *Winborne* v. *Commissioner*, decided April 9, 1945 (1945 C. C. H., par. 9260). Those cases presented the question whether an associate justice of the Supreme Court of North Carolina who maintained a residence in the section of the State whence he came could deduct his living expenses at Raleigh, where the court regularly sat, and the cost of traveling between his Raleigh residence and his other residence, as "ordinary and necessary * * * traveling expenses (including the

entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code (Appendix, *infra*). The court there affirmed the Tax Court's disallowance of the claimed deductions, holding that the business traveling expense allowance was intended to embrace only those outlays caused by the "exigencies of the business", not such as resulted from the taxpayer's choice in maintaining a residence at a distance from his business. It reached this conclusion on the basis of the language of Section 23 (*a*) (1) (A) read in conjunction with Section 24 (a) (1) (Appendix, *infra*), the long-standing applicable Treasury regulations (Appendix, *infra*), the settled administrative practice, and decisions of the Tax Court applying a like interpretation of the statute.

The instant case presents essentially the same issue. In reversing the Tax Court's disallowance of taxpayer's deductions the court below held in substance that the phrase, "while away from home" on business, as used in Section 23 (a) (1) (A) has reference to absence from an abode where the taxpayer has the "intention" of living permanently (R. 59) and where he "in fact resides" (R. 59), rather than absence on a business trip away from the place at which, as the court below stated was the case in this instance (R. 59), the taxpayer has his principal

office and place of employment. This construction of the business traveling expense provision is incompatible with that adopted by the Circuit Court of Appeals for the Fourth Circuit in the *Barnhill* and *Winborne* cases. The latter court cited the present case and expressly declined to accept its reasoning.

2. An early and authoritative resolution of the conflict is of considerable importance. The Treasury Department and the Tax Court have consistently construed the provision in Section 23 (a) (1) (A) authorizing deduction of ordinary and necessary business traveling expenses inclusive of meals and lodging, taken in conjunction with Section 24 (a) (1) prohibiting deduction of personal or living expenses, as extending relief to a taxpayer who lives in the locality where he regularly or principally works but is required temporarily to travel to other places of business.[1] Whether the

[1] The business traveling expense provision first appeared in its present form in Section 214 (a) (1) of the Revenue Act of 1921, and has been reenacted in the successive revenue acts. For illustrative administrative rulings see O. D. 905, 4 Cum. Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); I. T. 1264, I-1 Cum. Bull. 122 (1922); I. T. 1355, I-1 Cum. Bull. 194 (1922); I. T. 1380, I-2 Cum. Bull. 88 (1922); I. T. 3314, 1939-2 Cum. Bull. 152; G. C. M. 28672, 1943 Cum. Bull. 66. For illustrative Tax Court decisions see *Bixler* v. *Commissioner*, 5 B. T. A. 1181; *Duncan* v. *Commissioner*, 17 B. T. A. 1088, affirmed, 47 F. 2d 1082 (C. C. A. 2d); *Priddy* v. *Commissioner*, 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. C. A. 5th); *Tracy* v. *Commissioner*, 39 B. T. A. 578; *Lindsay* v. *Commissioner*, 34 B. T. A. 840; *Peters* v. *Commissioner*, 19 B. T. A. 901;

business traveling expense allowance was intended to sanction deduction of living expenses at a taxpayer's regular or principal place of business if he maintains an additional residence elsewhere, is a question which arises frequently in the collection of income taxes and affects the recovery of substantial amounts of revenue.[2] The decision below permits a taxpayer to transform his living expenses at his principal place of business into deductible travel expenses, if for reasons of his own he maintains at another point a residence which he considers his home. The advantage to taxpayers so situated and the discrimination between them and those whose only dwelling place is at their principal place of employment are obvious.

Griesemer v. *Commissioner*, 10 B. T. A. 386; *Brown* v. *Commissioner*, 13 B. T. A. 832; *Powell* v. *Commissioner*, 34 B. T. A. 655; *Schurer* v. *Commissioner*, 3 T. C. 544; *Gustafson* v. *Commissioner*, 3 T. C. 998. Where the taxpayer has a single place of employment it has sufficed to treat his "home" for tax purposes as his residence at the place of employment (e. g., *Bixler*, *Lindsay* and *Tracy* cases, *supra*); where the taxpayer conducts business at more than one place and divides his business time between them, his residence at the principal place is the statutory "home" (e. g., *Priddy*, *Brown* and *Powell* cases, *supra*); and where he leaves a permanent or regular place of business to go to another temporarily, his residence at the permanent or regular place is the statutory "home" (e. g., *Schurer* and *Gustafson* cases, *supra*. See also *Coburn* v. *Commissioner*, 138 F. 2d 763 (C. C. A. 2d), and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C. C. A. 9th)).

[2] One aspect of the problem is at present a matter of legislative consideration. See footnote 3, *infra*.

3. The court below failed, we submit, to pay the required deference to the decision of the Tax Court. The question relates to the construction of a long-standing provision of the Internal Revenue Code, containing the word "home" which has acquired a specific meaning in this context. That meaning grows out of administrative interpretation and legislative re-enactment[3] and has been shaped by the requirements of equitable tax administration. In such matters the Tax Court has "special competence" (*Dobson* v. *Commissioner*, 320 U. S. 489, 502) and its decision "is entitled to great weight" (*Trust u/w of Bingham* v. *Commissioner of Internal Revenue*, No. 932, October Term, 1944, p. 4 of slip opinion).

[3] It is worthy of note that H. R. 1627, 79th Congress, now pending, providing that for purposes of Section 23 (a) (1) (A) the "home" of a member of Congress shall be his place of residence in the State from which he is a member, would be superfluous if the decision below were correct; for a Congressman who maintained a residence in his district which he regarded as his home would be permitted to deduct his expenses while in Washington. The merits of the problem dealt with by the bill are different, however, from those affecting the taxpayer in the present case; for a member of Congress is confronted with legal and practical necessities which are absent in the case of a private individual.

The decisions bearing upon the present problem, including the present case and the *Barnhill* and *Winborne* cases in the Fourth Circuit, were recently discussed in hearings before a Subcommittee of the Committee on Appropriations of the Senate on H. R. 3109, 79th Congress, providing *inter alia* for a $2,500 tax-free annual expense allowance for members of the House of Representatives. See pp. 8–9 of the published hearings and cf. also pp. 2–7, 10–19, and 31–33.

Although judicial review of the question presented probably was not precluded, the serious nature of the decision below and of the conflict between it and the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Barnhill* and *Winborne* cases is emphasized by the reversal in this case of the Tax Court's decision.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

JUNE 1945.

APPENDIX

Internal Revenue Code:

SEC. 23. [As amended by Sec. 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798] DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(*a*) *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * *

(26 U. S. C., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * * *

(26 U. S. C., Sec. 24.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (a)-1. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, * * *. Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see section 19.23 (a)-2, advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. * * *

SEC. 19.23 (a)-2. *Traveling expenses.*—Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

(a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

(b) If an individual receives a salary and is also repaid his actual traveling expenses, he shall include in gross income

the amount so repaid and may deduct such expenses.

(c) If an individual receives a salary and also an allowance for meals and lodging, as, for example, a per diem allowance in lieu of subsistence, the amount of the allowance should be included in gross income and the cost of such meals and lodging may be deducted therefrom.

A payment for the use of a sample room at a hotel for the display of goods is a business expense. Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. A taxpayer claiming the benefit of the deductions referred to herein must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

Claim for the deductions referred to herein must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

Commuters' fares are not considered as business expenses and are not deductible.

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